IN THE COURT OF APPEALS STATE OF ARIZONA DIVISION TWO

FILED BY CLERK

JAN 30 2007

COURT OF APPEALS DIVISION TWO

Sierra Vista

Attorney for Respondent/Appellee

MICHAEL P. DEAN,		
)	2 CA-CV 2005-0155
Petitioner/Appellant,)	DEPARTMENT B
)	
v.)	MEMORANDUM DECISION
)	Not for Publication
PEGGY L. DEAN,		Rule 28, Rules of Civil
)	Appellate Procedure
Respondent/Appellee.)	
)	

APPEAL FROM THE SUPERIOR COURT OF COCHISE COUNTY

Cause No. DO 2003-00196

Honorable Wallace R. Hoggatt, Judge

AFFIRMED

Law Offices of Karl D. Elledge

By Karl D. Elledge

Sierra Vista

Attorney for Petitioner/Appellant

Nina L. Caples, P.C.

ESPINOSA, Judge.

By Nina L. Caples

¶1 Appellant Michael Dean appeals from the trial court's decree of dissolution dividing community property and awarding appellee Peggy Dean attorney fees and from the

denial of his motion for a new trial. We affirm the trial court's decisions for the reasons discussed below.

Factual and Procedural Background

- We view the evidence in the light most favorable to sustaining the trial court's findings and determine whether there was evidence that reasonably supports the court's decree. *See Mitchell v. Mitchell*, 152 Ariz. 317, 323, 732 P.2d 208, 214 (1987); *Gutierrez v. Gutierrez*, 193 Ariz. 343, ¶ 5, 972 P.2d 676, 679 (App. 1998). The parties were married for thirty-six years, during which Peggy moved repeatedly as Michael's job transfers required. At the time of trial, Michael was retired,¹ and Peggy was working, managing several businesses the couple owned.
- Beginning in 1995, Michael made multiple loans and investments with a person named Connie Daih.² From that time until trial, Michael had given Daih approximately \$285,000 in loans and investment capital, but he was unable to locate any documentation for these transactions. At least some of that money was raised by encumbering a residence that was community property and two previously unencumbered community property vehicles. Other assets were purchased with community funds but were placed directly in Daih's name.

¹Michael had worked part-time in the bookstore owned by the Deans prior to the entry of the temporary orders.

²Michael testified Peggy was sometimes present for preliminary discussions, but she may not have been present for the actual exchange of money. Peggy testified she never saw or signed a contract with Daih and had never seen totals of the loans and investments with her.

After trial, the court adopted some of each party's proposed language for the decree and made other findings regarding the community property and debt. The final decree also provided that approximately \$20,000 of Peggy's attorney fees would be paid from the proceeds of the sale of the community residence. Michael filed a motion for new trial, which was denied except for his request to remove a noncompete clause from the decree. This appeal followed.

Property Allocation

- A trial court's apportionment of community property will not be disturbed on appeal absent an abuse of discretion, and we view the evidence most favorably to sustaining the trial court's determination. *Gutierrez*, 193 Ariz. 343, ¶ 5, 972 P.2d at 679. A trial court's findings of fact in a dissolution proceeding will be sustained unless they are clearly erroneous. *In re Marriage of Berger*, 140 Ariz. 156, 161, 680 P.2d 1217, 1222 (App. 1983). We will not disturb the court's findings when conflicting evidence was presented at trial. *Smith v. Smith*, 89 Ariz. 84, 86, 358 P.2d 183, 185 (1960).
- As an initial matter, we note a trial court has "great discretion in the apportionment of the community assets and obligations." *Neal v. Neal*, 116 Ariz. 590, 594, 570 P.2d 758, 762 (1977). And the "court is not required to divide the property evenly, only equitably." *McClennen v. McClennen*, 11 Ariz. App. 395, 398, 464 P.2d 982, 985 (1970). Moreover, the court is not required to divide each individual asset, but simply to make an equitable division of the total community assets and debts. *See id*.
- Michael argues the trial court abused its discretion in dividing the parties' community property because "Peggy's real property valuations were not supported by

substantial evidence." Michael did not object to Peggy's testimony about the values at trial, and he seems to ignore the premise that, as the co-owner of the businesses and the real property, Peggy was equally as qualified as Michael to testify about the value of the property. See Town of Paradise Valley v. Laughlin, 174 Ariz. 484, 486, 851 P.2d 109, 111 (App. 1992). "Any explanation of the basis for [an owner's] opinion of value goes to the weight of the evidence." *Id*.

- Michael does not assert he requested the trial court to make specific factual findings in accordance with Rule 52(a), Ariz. R. Civ. P., 16 A.R.S., Pt. 1, and we have found no such request in the record. In the absence of a request for Rule 52(a) findings, we may infer that the trial court made any findings necessary to sustain its judgment as long as there is evidence to reasonably support such findings. *Elliott v. Elliott*, 165 Ariz. 128, 135, 796 P.2d 930, 937 (App. 1990); *Thomas v. Thomas*, 142 Ariz. 386, 390, 690 P.2d 105, 109 (App. 1984) ("An appellate court may 'infer from any judgment the findings necessary to sustain it if such additional findings do not conflict with express findings and are reasonably supported by the evidence.""), *quoting Wippman v. Rowe*, 24 Ariz. App. 522, 525, 540 P.2d 141, 144 (1975).
- The trial court heard conflicting testimony from Michael and Peggy about their opinions of the value of the businesses and other property.³ We defer to a trial court's judgment of the credibility of each witness and the determination of the appropriate weight

³To the extent Michael seems to suggest his testimony was equivalent to that of an expert witness, the record does not reflect he was disclosed as an expert or qualified as such by the trial court. Rather, Michael testified as a lay witness, just as Peggy did.

to give the testimony. *Ruvalcaba v. Ruvalcaba*, 174 Ariz. 436, 445, 850 P.2d 674, 683 (App. 1993); *see also Gutierrez*, 193 Ariz. 343, ¶ 13, 972 P.2d at 680-81. The fact the trial court accepted Peggy's values over Michael's does not mean the court disregarded evidence, but instead suggests the court simply found Peggy's testimony more credible and gave it more weight. The trial court was entitled to rely on Peggy's testimony based on its "ability to evaluate the credibility of witnesses" and "accord [witness testimony] its appropriate weight." *Ruvalcaba*, 174 Ariz. at 445, 850 P.2d at 683.

Michael relies on *Kelsey v. Kelsey*, 186 Ariz. 49, 53, 918 P.2d 1067, 1071 (App. 1996), a case where Division One reversed the trial court's valuation of a real estate holding partnership, because there, "even fully crediting wife's testimony [did] not produce a value of \$200,000 for [the disputed] asset." Here, however, reasonable evidence supports the trial court's valuations, including Peggy's testimony that the bookstore generated a net profit of \$1,800 to \$2,000 per month, the pool hall had consistently lost money since it was purchased, around \$14,000 was still owed on the purchase, the business equipment for the pool hall was "old and dilapidated," the carpet and interior of the bookstore needed renovation, the pool hall insurance cost approximately \$500 per month, the bookstore insurance had increased nineteen percent in the previous year, and one credit card had an additional \$3,500 in business debt to be paid. Because there was evidence that reasonably supports the values the trial court placed upon the businesses and other property, we cannot say the court abused its discretion. *See Smith*, 89 Ariz. at 86, 358 P.2d at 185; *Gutierrez*, 193 Ariz. 343, ¶ 5, 972 P.2d at 679.

- Michael also complains the trial court used "unclear valuations" to allocate the property and debt and improperly credited him with the value of certain community property stocks he had sold shortly before the dissolution petition was filed. Again, however, Michael did not request specific factual findings. And because he has cited no authority in support of either of these arguments, we do not address them. *See* Ariz. R. Civ. App. P. 13(a)(6), 17B A.R.S.
- Michael next claims the trial court's allocation of the community assets and debts was "punitive," not equal. As noted above, the allocation of community property between the parties need only be equitable rather than equal. *See McClennen*, 11 Ariz. App. at 398, 464 P.2d at 985. The trial court heard the testimony of both parties, including their opinions about values, the encumbrances attached to the various properties, and how the funds received in exchange for those encumbrances were used. The trial court could also, in making its final allocations under A.R.S. § 25-318(A),⁴ consider Michael's prepetition dispositions of community property and encumbrance of community assets for the purpose of providing cash to Daih and purchasing property that was titled in Daih's name.⁵ Thus, even if the division of community property did result in Michael's bearing a greater share of

⁴That statute reads, in pertinent part: "[The court] shall also divide the community, joint tenancy and other property held in common equitably, though not necessarily in kind.... This section does not prevent the court from considering all actual damages... from ... concealment or fraudulent disposition of community, joint tenancy and other property held in common." A.R.S. § 25-318(A).

⁵Although Michael provided over \$200,000 in cash to Daih, when asked what she had specifically used it for, Michael testified he was not "aware" of what Daih had done with the money.

the community debt than Peggy, the trial court was entitled to make such a division. *See Hrudka v. Hrudka*, 186 Ariz. 84, 93, 919 P.2d 179, 188 (App. 1995). Michael's related argument that Peggy "violated the April 1, 2003, agreement between the parties" is also not supported by any authority, and we therefore do not consider it. *See* Ariz. R. Civ. App. P. 13(a)(6).

Michael contends "the concept of fairness" required the trial court to credit him with an offset for the value of Peggy's accrued social security benefits. It is well established that social security benefits are a spouse's "separate property." *Luna v. Luna*, 125 Ariz. 120, 123, 608 P.2d 57, 60 (App. 1979). Michael, however, cites *Kelly v. Kelly*, 198 Ariz. 307, ¶ 1, 9 P.3d 1046, 1047 (2000), and *Kohler v. Kohler*, 211 Ariz. 106, ¶ 15, 118 P.3d 621, 625 (2005), to argue on appeal that a portion of his civil service retirement benefits should have been set aside as his separate property in an amount "equivalent in value to Peggy's social security benefits." In *Kohler* and *Kelly*, the courts devised a method to compute the amount of such an award "only if necessary to achieve equity." *Kohler*, 211 Ariz. 106, ¶ 16, 118 P.3d at 625. Here, however, the parties possessed sufficient community property for an equitable division of the marital estate. And Michael acknowledged at trial he is entitled to and presumably will receive a portion of Peggy's social security benefits based on the length of the marriage and Peggy's contributions to that system, although he did not know the exact amount. Michael has not shown that the overall distribution of the parties' community

⁶We note Michael failed to cite *Kelly v. Kelly*, 198 Ariz. 307, ¶ 1, 9 P.3d 1046, 1047 (2000), to the trial court or meaningfully explain the method he used to calculate the \$58,971 real property allocation that he sought, merely testifying he utilized an unidentified website to calculate the amount.

property was inequitable, and we therefore will not disturb it. *See McClennen*, 11 Ariz. App. at 398, 464 P.2d at 985.

Attorney Fees

Michael also challenges the trial court's award of attorney fees to Peggy. We review a court's ruling on a request for attorney fees for an abuse of discretion. *Roden v. Roden*, 190 Ariz. 407, 412, 949 P.2d 67, 72 (App. 1997). In dissolution proceedings, a trial court awards attorney fees pursuant to A.R.S. § 25-324, considering any disparity in the parties' financial resources and the "reasonableness of the positions each party has taken throughout the proceedings." At trial, some assets Michael had failed to disclose came to light, and other evidence suggested he had failed to comply with Peggy's discovery requests, created significant delay in the proceedings, and necessitated additional litigation, increasing the attorney fees for both parties. We cannot say the trial court abused its discretion by awarding Peggy attorney fees.

Motion for New Trial

Finally, Michael claims the trial court erred in denying his motion for a new trial, grounded on the same claims he has raised on appeal. In view of our discussion and resolution of those claims, we have no basis to say the trial court abused its discretion in so ruling. *See Harris v. Harris*, 195 Ariz. 559, ¶ 6, 991 P.2d 262, 264 (App. 1999) ("We review a trial court's denial of a motion for new trial for a clear abuse of discretion.").

⁷For example, at trial, Michael produced detailed charts containing information he claimed he "had no access to" during the discovery process. He defended his failure to previously disclose the information by insisting that Peggy had requested "documents" that were no longer in his possession, rather than information.

Disposition

¶16	The trial court's rulings are affirmed.	
		PHILIP G. ESPINOSA, Judge
CONCU	RRING:	
PETER J	J. ECKERSTROM, Presiding Judge	
J. WILL	IAM BRAMMER, JR., Judge	